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Search and Rescue as a Geopolitics of International Law

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8.1 Introduction

The notion of Europe being 'flooded' or 'invaded' by boat migrants is one of the most often invoked examples by those arguing that globalization is fundamentally eroding state sovereignty. In the wake of the current global refugee crisis, hundreds of thousands of refugees and migrants risk their lives each year in the attempt to irregularly reach Europe. Many others never make it that far. In 2016, more than 5000 migrant deaths were recorded in the Mediterranean – accounting for nearly two-thirds of all migrant fatalities worldwide.[1] Given the clandestine nature of these crossings, the real number may well be substantially higher.

From the perspective of European states, the irregular migrant has become the embodiment of the inability to protect and control access to that most sacred property of statehood, the sovereign territory. Hence, maritime border controls have been expanded and transformed with navy vessels, surveillance planes and radar stations creating a 'virtual border' across the Mediterranean. In addition, transit and origin countries are increasingly conscripted to grant access to their territorial waters or through their own authorities effect migration control on behalf of

* This chapter draws partly on two earlier publications: Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving Lives in Mare Liberum' (2014) 17 *Journal of International Relations and Development* 439–468; Thomas Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration', in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (The Hague: Brill, 2016), pp. 60–79.

[1] https://missingmigrants.iom.int/latest-global-figures.

the European Union (EU) and its Member States.[2] While these policies involving maritime interception and international cooperation to prevent migrants from departing are often framed in humanitarian terms – as 'search and rescue' operations intended to prevent the loss of lives at sea – the fact is that these measures only tend to drive up prices and to force migrants to take longer, more risky and dangerous journeys.[3]

The present chapter examines the different approaches pursued by Mediterranean states in order to manage boat migrants and eschew responsibility for people in distress at sea in the context of the maritime 'search and rescue' rules established as a matter of international law. As will be shown, not only does the current politicization of migration issues in Europe provide for evermore draconian policies, the particular legal geography in which this issue is embedded also provide a particular apt case for illustrating several of the different state strategies outlined in Chapter 1.

As a result, the boat migrant finds herself embedded in a complex international legal field, involving multiple bases for jurisdiction and interlocking legal regimes in the context of rescue at sea and international human rights law. Developments in both regimes have further taken place, leading to processes of both de- and re-territorialization. This opens up a particular playing field between international law and politics, where states are able to simultaneously capitalize on policy innovations and legal developments in order to address the political imperative of managing irregular migration. Over the last decades, the governments of the Mediterranean have thus repeatedly locked horns over respective obligations vis-à-vis migrants lost at sea, several claims have been made that neighbouring countries were deliberately dumping rescuees in foreign territorial waters or search and rescue regions, and regular testimonies by survivors report about both commercial vessels and navy ships ignoring pleas to assist migrant boats in distress.[4]

[2] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).

[3] Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (London: Routledge, 2013). See also www.borderdeaths.org/.

[4] See e.g. Comisión Espanola de Ayuda al Regiado, 'Report on Certain Border Externalisation Practices Pursues by the Spanish Government That Violate the Rights Both Now and in the Future of Immigrants Who May Seek to Reach Spain Via the Southern Border', 30 May 2007. Consiglio Italiano per i Rifugiati, 'Report Regarding Recent Search and Rescue Operations in the Mediterranean', 1 June 2007.

8.2 The Law and Politics of Saving Lives in the *Mare Liberum*

Traditionally, the high seas are defined exactly as a space of non-sovereignty.[5] Since Grotius it has been accepted that the high seas can be subject to no national jurisdictions and are governed by a residual principle of freedom allowing vessels of all nations the right of passage, trade and exploitation.[6] On the high seas different and fewer rules supposedly apply; what happens here is not necessarily subordinated to the sovereign sphere and national laws of a single state. This is the truly *inter*-national sphere, containing both an inherent freedom to exercise sovereign power, but as a result also innate potential for conflict in the absence of neat delineations between competing claims.

To some extent, Grotius's principle of the *Mare Liberum* survives to this day. The 1958 Convention on the High Seas states that '[t]he high seas being open to all States, no State may validly purport to subject any part of them to its sovereignty' (Art. 2) and it affords all states the same basic freedoms of navigation, fishing, infrastructure and overflying.[7] Yet, despite its name, the *Mare Liberum* is hardly a space devoid of regulation. The law of the sea imposes a complex set of norms on the maritime environment, charting out a web of intersecting rights and obligations for both states and private actors. Equally important, modern international law provides for a host of competing and often overlapping claims in the maritime environment, in which territorial waters, the contiguous zone, nationality, flag state jurisdiction, nearest port of safety, next port of call, and regional search and rescue zones may all be invoked for the purpose of establishing authority or responsibilities.

[5] As a matter of modern international law, a state's territorial waters may extend twelve nautical miles (twenty-two kilometres) from the baseline, which the low water mark or internal waters (Art. 3 of the Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 1 November 1994, 1833 UNTS 397). This belt is regarded part of the state's sovereign territory for all purposes, save that international maritime law demands that states allow foreign ships innocent passage. Certain sovereign functions may additionally be exercised within an additional contiguous zone extending up to 24 miles from the low water mark. While the contiguous zone is technically considered the high seas, states are allowed to exercise control and checks to 'prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations' (Art. 24(1) of the Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, in force 10 September 1964, 516 UNTS 205). Finally, states may extend exclusive claims to e.g. fishing within the exclusive economic zone, extending 200 miles from the baseline (Art. 56 of the Convention on the Law of the Sea).

[6] Hugo Grotius, *The Freedom of the Seas* (Oxford: Oxford University Press, 1916).

[7] Convention on the High Seas, Geneva, 29 April 1958, in force 30 September 1962, 450 UNTS 11.

In contrast, international human rights law normally presumes a binary relationship between a single state and individuals within its jurisdiction. The major achievement of the human rights movement was exactly to introduce to international law a set of norms that did not simply concern the *horizontal* relationship between states, but a *vertical* obligation between each state and its subjects and aliens within its territory.[8] This is also reflected in the international refugee protection regime and the 1951 Refugee Convention. International refugee law deliberately shies away from placing any obligations on the countries of origin,[9] and despite a call for international cooperation in the Convention's preamble, the basic legal mechanism for dividing responsibility among states remains individualized and based on territorial proximity.[10]

Both the law of the sea and international human rights law impose obligations upon states even outside their territorial waters. Grotius himself underscored that the correlate of the sovereign freedom afforded on the high seas is a common obligation to obey by 'the law of hospitality which is of the highest sanctity'.[11] Both the duty to render assistance to migrants and others lost at sea and to allow disembarkation of those rescued at a place of safety are both old and universal norms of international law.[12] In their modern iteration, every state must require the captain of a ship flying its flag to 'render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance'.[13] Beyond imposing an

[8] Henry Steiner, 'International Protection of Human Rights', in Malcolm D. Evans (ed.), *International Law*, 2nd edn (Oxford: Oxford University Press, 2006), 753–82, at 769; Sigrun Skogly and Mark Gibney, 'Transnational Human Rights Obligations' (2002) 24 *Human Rights Quarterly* 781–98, at 782

[9] Indeed, certain refugee instruments have been explicit in stating that the granting of asylum is not to be considered as an 'unfriendly act' towards countries of origin. See e.g. the preamble of the UN Declaration on Territorial Asylum. UNGA resolution 2312 (XXII), 14 December 1967.

[10] Arguably, certain later policy developments would seem to complicate this picture by invoking competing jurisdictions through e.g. safe third-country and safe country of origin policies.

[11] Grotius, *The Freedom of the Seas*, 1.

[12] Both principles are considered international customary law as well as codified within the global maritime search and rescue regime. See in particular Art. 98 in the Convention on the Law of the Sea; the International Convention for the Safety of Life at Sea, London, 1 November 1974, in force 25 May 1980, 1184 UNTS 3; and the International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, in force 22 June 1985, 1403 UNTS.

[13] Art. 98(1) of the Convention on the Law of the Sea; Chapter V, Regulations 10(a) and 33 of the International Convention for the Safety of Life at Sea. This entails a positive

obligation for both official and private vessels to rescue anyone encountered in distress, coastal states further have a positive duty to maintain 'an adequate and effective search and rescue service' and to ensure coordination of search and rescue operations.[14] To that end the international search and rescue regime has led to the division of the world's oceans into national search and rescue regions, within which each coastal state has the primary responsibility for ensuring that distress calls are received and responded to.[15]

In parallel, the corner-stone of international refugee law, the principle of *non-refoulement*, requires states not to return in any manner a person with a well-founded fear of persecution.[16] While the *non-refoulement* principle has previously been interpreted as applying only to refugees who have already arrived at a state's territory, both international human rights law and international refugee law has come to understand this principle to apply wherever states exercise jurisdiction.[17]

For a long period, the issue of disembarkation and subsequent return to the country of origin of persons rescued at sea was a nominally minor issue mainly related to sailors. As such, the obligations imposed by international law in regard to boat migrants were seen as reciprocal and reconcilable to the perceived self-interest of relevant states. Similarly, the modern refugee protection regime came about as an attempt, albeit imperfect, to resolve the problem of those occupying the undesirable and in systemic terms impossible position in between mutually exclusive sovereign states. During the first decades of the Cold War, receiving refugees was entailed scoring ideological value for states, allowing people 'to vote with their feet' by admitting the enemies of one's enemy.

A combination of several factors has fundamentally changed this picture, however. New refugee flows emerged from proxy wars fought in the Global South in the 1980s.[18] A decade before, the oil crisis meant that

obligation of flag states to adopt domestic legislation that imposes penalties on shipmasters who ignore or fail to provide assistance, see Michael Pugh, 'Drowning Not Waving: Boat People and Humanitarianism at Sea' (2004) 17 *Journal of Refugee Studies* 50–68. In practice, however, many states have failed to do so and enforcement often remains difficult, see Sophie Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 *Sri Lanka Journal of International Law* 85–107.

[14] Art. 98(2) of the Convention on the Law of the Sea.

[15] International Convention for the Safety of Life at Sea, as amended.

[16] Art. 33(1) of the Convention Relating to the Status of Refugees. 28 July 1951. 189 UNTS 2545.

[17] Gammeltoft-Hansen, *Access to Asylum*, 94–99.

[18] Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, New Issues in Refugee Research no. 54, United Nations High Commissioner for Refugees,

most European countries abandoned their welcoming labour immigration schemes, placing additional stress on the asylum institution. And at the same time, globalization allowed new patterns of migration and refugee flight by air and by sea, leading to mixed flows of irregular migrants, often facilitated by human smugglers specialized in avoiding traditional forms of border control.[19] Last, but not least, the advent of large-scale boat migration from refugee producing countries made receiving states concerned that asylum processing and protection responsibilities would follow from search and rescue operations. As a result, the hitherto relatively trivial issue of disembarkation of those rescued became politicized and subject to a variety of interpretations and resulting political stalemates between states each arguing against taking responsibility.[20]

In this context, both the *non-refoulement* principle and the duty to perform search and rescue have come to constitute significant fetters upon states' prerogative to perform border controls. As the drafting committee of the 1951 Refugee Convention made clear, the *non-refoulement* clause constitutes 'an exceptional limitation of the sovereign right of states to turn back aliens to the frontiers of their country of origin'.[21] As such, refugee and human rights law require border officials to immediately address those claiming to be in need of international protection before applying any generalized measures to block or return irregular boat migrants. Similarly, search and rescue rules are often triggered in the conduct of maritime border control where migrant vessels are either deemed unseaworthy or capsize during the encounter, either deliberately as migrants seek to provoke a rescue operation, or involuntarily if the weight of those on board the often-overcrowded ships shifts too much to one side.[22]

Both legal regimes have sought to respond to this new reality. Within international human rights law e.g. by expanding the application of the *non-refoulement* principle and other human rights norms in situations

Geneva (2002); Aristide Zolberg, 'Beyond the Crisis', in Peter M. Benda and Aristide Zolberg (eds), *Global Migrants, Global Refugees* (New York: Berghahn Books, 2001), 1–19.

[19] Matthew J. Gibney and Randall Hansen, *Asylum Policy in the West: Past Trends, Future Possibilities*, WIDER Discussion Paper, UNU/WIDER, Helsinki, Finland (2003); Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd edn (New York: Palgrave-Macmillan, 2003).

[20] Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (The Hague: Brill, 2016).

[21] Remark made by the Israeli delegate, Nehemiah Robinson. Ad Hoc Committee on Statelessness and Related Problems. First Session, 20th meeting. E/AC.32/SR.20, para. 49.

[22] Interview with Spanish naval captain, Las Palmas, 23 April 2007.

where states perform migration control extra-territorially, and within search and rescue by seeking to resolve issues relating to the division of responsibilities and disembarkation for rescued migrants. Nonetheless, legal developments have not necessarily resulted in better protection of irregular boat migrants on the high seas, as evidenced by the growing death toll[23] and repeated political clashes in relation to this issue.

As will be argued in the following, rather than reducing the room for politics, paradoxically the development and expansion of international law on the high seas has enhanced the possibility of political manoeuvring. Context matters here. In comparison with *terra firma*, on the high seas the precise division and content of the sovereign rights and obligations are more open to interpretation and subject to varying interpretations. In this space, a particular geopolitics emerges, in which the zonal divisions of each state's search and rescue obligations and territorial logics in regard to asylum obligations clash with the more functional divisions of authority and assertions of power pertaining to migration control at sea. As a result, boat migrants find themselves subjected to an increasingly complex field of governance, in which participating states may successfully barter off and eschew their international obligations by reference to traditional norms of sovereignty and international law. Thus, rather than simply a space of non-sovereignty per se, the high seas become the venue for a range of competing claims and disclaims to sovereignty and responsibility.

In the following, we identify a number of politico-legal strategies pursued by states in this area, notably interpretive framing, regime shopping, jurisdiction shopping and international cooperation. While developments in both the law on search and rescue and international human rights law intended to improve the protection of irregular migrants have changed the modalities of these practices, the sovereignty game around search and rescue remains in place.

8.3 The Politics of Interpretation

The political struggles over search and rescue are facilitated by the continued unclarity in terms of the international legal framework. While few states have challenged the existence of search and rescue obligations at the general level, several issues of how to interpret the more specific obligations remain hotly contested. Neither the 1979 Search and Rescue nor the 1974 Safety of Life at Sea conventions provide a solid definition of what

[23] www.borderdeaths.org/.

constitutes 'distress'.[24] Instead, the captain of the intercepting ship is given authority to judge when a vessel is in need of rescue. Malta, for example, appears to apply a particularly narrow definition, effectively distinguishing between 'being in need of rescue' and general 'unseaworthiness' by modern standards. According to a senior officer of the Armed Forces of Malta, distress is defined as 'the imminent danger of loss of lives, so if they are sinking it is distress. If they are not sinking it is not distress' and hence no rescue operation is required.[25]

The problematic nature of this kind of discretion is compounded by the unavailability of the regular accountability mechanisms that usually accompanies such measures within the territory of liberal states. Compared to the migrant or asylum seeker arriving at the territory of his or her destination state, migrants who find themselves in distress or encounter migration control on the high seas will have obvious difficulties in accessing NGOs, medias, lawyers, or relevant authorities to plea their case and protection claims thus easily risk being 'overheard'.[26] Maltese authorities have thus been accused of encouraging and even supplying migrant boats with water and fuel to sail on to Italian waters and thereby 'pass the buck'.[27]

Secondly, disputes relate to the division of responsibilities. The search and rescue regime entails the division of the high seas into geographical

[24] Pugh, 'Drowning Not Waving', 58. The Search and Rescue Convention defines distress as 'situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'. In 2012 the Parliamentary Committee of the Council of Europe emphasized that a situation of distress should be evaluated based on several factors, including the number of persons on board the vessel relative to its size, the number of persons showing signs of distress and the distance of the vessel from shore. Parliamentary Assembly of the Council of Europe, 'Lives Lost in the Mediterranean Sea: Who Is Responsible?', Doc. 12895 (2012).

[25] Silja Klepp, 'Illegal Migration and Migrant Fatalities in Malta', paper presented at the Human Cost of Border Control in the Context of EU Maritime Migration Systems, Vrije Universiteit, Amsterdam, 25–27 October 2009.

[26] Gammeltoft-Hansen, *Access to Asylum*, 209–30.

[27] In August 2009, Italian authorities rescued a boat with five Eritreans close to Lampedusa. The seventy-five other passengers originally on board had died of dehydration and starvation during the three weeks the boat had been at sea. The survivors claimed that at least ten ships had passed them by without rescuing them. In addition, the Italian Ministry of the Interior accused Malta's Maritime Squadron of spotting the boat two days prior to the Italian interception. According to the survivors, the Maltese authorities had supplied them with water and food supplies but not taken any steps to rescue them. A spokesperson from Malta's Armed Forces acknowledged that they had encountered the boat, but claimed the vessel and passengers appeared to be 'in very good shape' and that the migrants had refused assistance.; see further Repubblica, 22 August 2009.

search and rescue regions, in which each coastal state maintains overall responsibility for coordinating search and rescue operations. The importance of these zones was emphasized in the 2004 amendments to the Search and Rescue and Safety of Life at Sea conventions.[28] The amendments specify that persons rescued at sea are to be taken to a place of safety and the accompanying guidelines stress the importance of the *non-refoulement* principle in that disembarkation should be avoided in 'territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened'.

At the same time, however, no direct obligation is placed upon states to allow rescued persons' access to their territory. Instead, contracting states shall 'co-ordinate and co-operate' to ensure that a place of disembarkation is found with a minimum further deviation from the ships' intended voyage whilst still respecting safety of life at sea. Where this does not happen on its own, a fall-back mechanism is inserted by noting that the state 'responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and co-operation occurs'.[29] This residual obligation places additional emphasis on organizing disembarkation according to the existing division of the high seas into national search and rescue regions, which has been confirmed by the IMO Facilitation Committee.

If previously the law of the sea provided little guidance as to the resolution of conflicts over where rescued persons should be put ashore, the 2004 amendments implies a significant narrowing of the interpretative scope towards placing responsibility to ensure disembarkation with the state in charge of the SAR region. Under such an interpretation, carrying out migration control and search and rescue operations within North African states' territorial waters and SAR regions naturally becomes an attractive strategy for EU member states. Indeed, the intensified patrols by EU's border agency, Frontex, means that European patrol vessels are increasingly operating inside foreign search and rescue regions in the Mediterranean. Yet, if the above interpretation of disembarkation responsibilities is accepted, the amended SAR regime establish a normative structure for jurisdiction shopping. Barring any EU states offering disembarkation, the

[28] Amendments to Chapter V of the International Convention for the Safety of Life at Sea and 2–4 of the Annex to the International Convention on Maritime Search and Rescue, entry into force 1 July 2006.

[29] International Maritime Organization, Guidelines on the Treatment of Persons Rescued at Sea, MSC.167(78), 20 May 2004, Principle 6.17.

assumption would be that the respective third state would be responsible for allowing disembarkation of persons rescued during operations taking place within their search and rescue zone, and from then on presumably take on any asylum claims or enforce returns to the country of origin.

International agreement on this issue is still not uniform, however, and the language is clearly a compromise as indicated by the continued use of softer language such as 'coordinate' and 'should' in the aforementioned article in the IMO guidelines.[30] Several states continue to dispute the SAR region divisions or apply different interpretations in regard to disembarkation. Malta, which maintains an excessively large SAR region (a remnant of when Malta was under British colonial rule), has so far refused to ratify the 2004 amendments for fears that it would impose unrealistic obligations to disembark migrants rescued by other states and private vessels. Malta instead maintains that the coordinating country's obligation is to disembark rescued persons at the 'nearest safe port of call'.[31] This has led to further tensions between Malta and Italy following a series of incidents where migrants were rescued in Malta's SAR region yet were geographically closer to the Italian islands Lampedusa and Pantellaria than Malta's mainland. As neither country has been willing to allow disembarkation, the result has been lengthy stand-offs, in some cases leading to migrant deaths, and a number of confrontations between Italian and Maltese naval vessels literally trying to block each other from entering its territorial waters and disembark rescued migrants.[32]

8.4 Regime Shopping

The high seas furthermore provide a rather different legal environment than that normally encountered by migrants and refugees arriving at the territory of a host state. As noted above, the refugee regime in particular pays homage to the principle of territoriality. While the *non-refoulement* principle is generally accepted to apply wherever states exercise jurisdiction,[33] it remains a reactive obligation in the sense that it presupposes some kind of qualified contact between the state and the

[30] See further Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 *International Journal of Marine and Coastal Law* 523–42.

[31] Raphael Vassallo, 'Between a Rock and a Hard Place', *Malta Today*, 13 September 2009.

[32] Derek Lutterbeck, 'Migrants, Weapons and Oil: Europe and Libya after the Sanctions' (2009) 14 *The Journal of North African Studies* 169–84.

[33] Gammeltoft-Hansen, *Access to Asylum*, 94–99.

asylum seeker. The importance of territorial delineations becomes even more evident when moving past this fundamental obligation and looking at the wider set of protections guaranteed by the international refugee protection regime. The rights stemming from the 1951 Refugee Convention are not granted *en bloc*, but rather progressively according to the 'level of attachment' a refugee obtains to a given country. Thus, the more sophisticated rights, such as access to welfare, employment and legal aid, are only granted when the refugee is 'lawfully staying' or 'durably resident' in the territory of the host state. Conversely, refugees or asylum seekers who are not present in a state's territory but nonetheless under its jurisdiction, such as on the high seas or in the territory of a third state, are only entitled to a basic set of rights centred around the *non-refoulement* obligation.[34]

The incremental approach reflects a sensible concern of the drafters not to immediately extend the full scope of rights in situations where refugees may arrive spontaneously in large numbers.[35] Yet, at a time when several states are moving both migration control and asylum processing offshore, this notion of progressive realization of rights risks being cut short, as refugees and asylum seekers may never reach the territory of the acting state.

In contrast with the territorial focus of refugee law, the law of the sea is generally informed by a 'functional' logic.[36] The law of the sea accepts that certain prerogatives short of full sovereignty may be projected beyond the state's territorial jurisdiction. This includes the right to exercise migration control within the 24-mile contiguous zone,[37] and the extension of exclusive claims to e.g. fishing within the exclusive economic zone, extending 200 miles from the baseline.[38]

In the context of boat migrants, this shift creates a pretext for political attempts to sever the bond between authority and responsibility, leaving states free to assert sovereign prerogatives in regard to migration

[34] The most pertinent rights under the Refugee Convention that are specifically granted without reference to being present or staying at the territory include Art. 33 (*non-refoulement*), Art. 16 (access to courts) and Art. 3 (non-discrimination). Somewhat more specific and limited in their extraterritorial remit Arts. 13 (property), Act. 22 (education) and Act. 20 (rationing) also apply extraterritorially. James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 160ff.

[35] Hathaway, *The Rights of Refugees under International Law*, 157ff.

[36] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (The Hague: Martinus Nijhoff, 2007); Brian D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford: Clarendon Press, 1988).

[37] Art. 24(1) of the Convention on the Territorial Sea and Contiguous Zone.

[38] Art. 56 of the Convention on the Law of the Sea.

control without taking on the correlate duties that would normally flow from international refugee and human rights law. This argument was made most clearly by the Italian government in the *Hirsi* case.[39] The case concerned Italy's much-criticized interception programme in cooperation with Libya from 2009 to 2011. The Italian government claimed that even though the applicants had been brought on board Italian navy vessels – something that will normally trigger the state's jurisdiction[40] – the Italian authorities had not exercised 'absolute and exclusive control'[41] over the applicants, but merely carried out a search and rescue operation on the high seas in accordance with its obligations under the law of the sea. According to the government:

> The Italian ships had confined themselves to intervening to assist the three vessels in distress and ensuring the safety of the persons on board. They had then accompanied the intercepted migrants to Libya in accordance with the bilateral agreements of 2007 and 2009. The Government argued that the obligation to save human lives on the high seas, as required under the Montego Bay Convention, did not in itself create a link between the State and the persons concerned establishing the State's jurisdiction.[42]

Such attempts towards 'regime shopping' in order to escape human rights obligations are far from limited to maritime interception.[43] Yet, the European Court of Human Rights has so far rejected that parallel obligations under international law – whether part of bilateral and regional arrangements or under multilateral treaties – can displace a state's human rights obligations.[44] In the *Hirsi* case, it did so by making exactly the opposite argument, namely that general international law supported a finding of

[39] *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. no. 27765/09. 23 February 2012.

[40] *Medvedyev and Others v. France*. European Court of Human Rights. Appl. no. 3394/03. 29 March 2010 GC; *Xhavara and fifteen v. Italy and Albania*. European Court of Human Rights. Appl. no. 39473/98. 11 January 2001 (admissibility).

[41] *Hirsi*, ibid., para. 64. See further Chapter 3, this volume.

[42] *Hirsi*, ibid., para. 65.

[43] Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (London: Routledge, 2016).

[44] In *Al-Saadoon and Mufdhi v. United Kingdom* (European Court of Human Rights. Appl. no. 61498/08. 2 March 2010), the UK government thus argued that that it was under a bilateral legal obligation to transfer the applicant to the Iraqi authorities, even though such a transfer might constitute refoulement in relation to Art. 2, as there was a serious risk that they would be subjected to the death penalty. While the European Court of Human Rights acknowledged that 'the Convention should be interpreted as far as possible in harmony with other principles of international law . . . [and] . . . recognises the importance of international cooperation' (para. 126), it rejected this claim, arguing that 'Article 1 makes no

human rights jurisdiction, and that obligations in relation to different bodies of international law applied cumulatively:

> The Court observes that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extra-territorial exercise of the jurisdiction of that State [. . .] Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.
>
> . . .
>
> Moreover, Italy cannot circumvent its 'jurisdiction' under the Convention by describing the events at issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.[45]

However important the *Hirsi* judgment was from a human rights perspective, it is unlikely to prove the end of political manoeuvring to avoid human rights obligations in the context of maritime search and rescue. Following the overturn of the Tunisian government, Italy was quick to negotiate a new agreement to deploy its naval assets in international waters north of Tunisia's coastline.[46] Yet in contrast to the Libya scheme, Italy's role is in this case limited to notifying its Tunisian counterparts whenever migrant vessels are leaving the coast. As it is Tunisia's authorities undertaking the interception before the boats leave territorial waters, Italy thus claims to avoid triggering any direct human rights responsibility.[47]

distinction as to the type of rule or measure concerned and does not exclude any part of the Contracting Party's "jurisdiction" from scrutiny under the Convention' (para. 128).

[45] *Hirsi*, ibid., paras 77 and 79.

[46] Ministry of the Interior, 'Siglato l'Accordo tra Italia e Tunisia', press release, 6 April 2011. Available from www.interno.it. See further Matteo Tondini, 'The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the Ecthr Decision in the Hirsi Case' (2012) 18 *Journal of International Maritime Law* 59074, at 74

[47] Customary international law does establish principles whereby a secondary responsibility may fall upon Italy for 'aiding or assisting' another state in the commission of an internationally wrongful act. See in particular the International Law Commission, Articles on State Responsibility, Art. 16. Yet, in practice this sort of indirect obligation has proved difficult to invoke in regard to human rights, and it demands that both states are bound by the same international treaties. See Tom de Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2014) 28 *Journal of Refugee Studies* 118–34 and Thomas Gammeltoft-Hansen and James C. Hathaway,

Vice versa, for an institution such as the European Court of Human Rights, precedent is likely to structure the ongoing development of interpretation in this area. Even if a more 'functional' approach to establishing extra-territorial responsibility may be finding its way into the jurisprudence of the European Court of Human Rights,[48] existing case law retains a strong affinity to territoriality principles,[49] resulting in the rather strenuous tests for 'effective control over territory' and 'personal authority' that are likely to exclude certain instances of offshore migration control.[50]

8.5 Marketization and Jurisdiction Shopping

Third and finally, the boat migrant is caught up in a more general shift towards neoliberal governance. As aforementioned, migration control is traditionally considered an inalienable sovereign function of the state. Yet today, migration management is fast becoming a key foreign policy issue or even commodity, where deals are being struck between developed states and the countries of origin and transit.[51] In February 2017 Italy, backed by the EU Council, concluded an agreement with Libya's GNA government, promising to provide both funding and equipment to Libya's struggling coastguard in exchange for the fragile government's support in

'Non-refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235–85, at 267ff.

[48] See e.g. *Pad and Others v. Turkey*. European Court of Human Rights. Appl. no. 60167/00. 28 June 2007 and *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. no. 55721/07. 7 July 2011, para. 135. See further Gammeltoft-Hansen and Hathaway, 'Non-Refoulement', 266ff.

[49] Notably *Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxemburg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK*. European Court of Human Rights. Appl. no. 5207/99. 12 December 2001 (Grand Chamber). For critique see e.g. Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The Nato Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection' (2005) 23 *Boston University International Law Journal* 56–136; Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), 83–123.

[50] Gammeltoft-Hansen, *Access to Asylum*, 100–157.

[51] Aderanti Adepoju, Femke Van Noorloos and Annelies Zoomers, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review' (2010) 48 *International Migration* 42–75; Philippe Fargues and Christine Fandrich, *Migration after the Arab Spring*, Migration Policy Centre Research Report 2012/09, September 2012.

stopping boat migrants towards Europe.[52] Likewise, the 2015 EU-Turkey agreement involved both cooperation on migration control and a return arrangement for asylum seekers arriving in Greece in exchange for the EU speeding up accession talks, visa liberalization, resettlement spaces and a total of 3 billion Euros to provide refugee assistance in Turkey.[53] The political backdrop for the *Hirsi* case mentioned above was the 2007 agreement between Italy and Libya, promising the latter US$5 billion if the Gaddafi regime would set up radar detection facilities on Libya's shores and work with Italy to prevent the departure of unauthorized migrants.[54] Outside Europe, Australia's 'Pacific Solution' saw that country woo the island state of Nauru with offers of free medical care, educational opportunities and sports ovals in return for the warehousing in Nauru of boat migrants intercepted by Australia.[55] That deal was the genesis for subsequent outreach to other neighbouring states, including Indonesia and Papua New Guinea,[56] intended to prevent boats carrying migrants from travelling towards Australia.

The above examples may be seen as evidence of an increasing 'marketization of migration management', in which global migration governance are increasingly adopting the methods and values of the market

[52] Nikolaj Nielsen, 'Italy and Libya Cut Migrant Busting Deal', *EU Observer*, 3 February 2017, https://euobserver.com/migration/136781; Council of the European Union, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route', 3 February 2017.

[53] The Agreement builds on the EU-Turkey Joint Action Plan of 15 October 2015.

[54] The Treaty on Friendship, Partnership and Cooperation between Italy and Libya was signed on 30 August 2008 and entered into force on 2 March 2009. Cooperation under the treaty was halted in March 2011 following the NATO bombing campaign. See further Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York, September 2009, 24; Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law', in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Leiden: Martinus Nijhoff, 2012), 273–98.

[55] Tara Magner, 'The Less Than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53–90.

[56] In July 2013 Papua New Guinea (PNG) and Australia signed a bilateral agreement to process and resettle an uncapped number of asylum seekers in PNG, to be funded by Australia but administered by PNG. As well as funding the entire arrangement, Australia announced a suite of additional development assistance programmes to the developing state. Regional Resettlement Arrangement between Australia and Papua New Guinea, signed in Brisbane 19 July 2013; Helen Brown, *Indonesia to change visa requirements for Iranians entering the country following request from PM Kevin Rudd*, Australian Broadcasting Commission, 19 July 2013, www.abc.net.au/news/2013-07-18/indonesia-to-change-visa-requirements-for-iranians/4829434.

to guide policy development and implementation. This marketization is premised on a combination of jurisdiction shopping and commercialization of sovereignty itself. As certain states are keen to outsource the less palatable aspects of governments, such as migration control, others states are making their territory and/or authorities available for the same purpose in exchange for funds, development assistance, trade privileges, labour migration quotas or some other form of compensation. The result is that sovereign prerogatives, territory and functions are strategically traded and commodified among states and between governments.[57]

The introduction of such market-based logics into the migration field have deep-seated and troubling consequences for the migrants affected. In terms of human rights accountability, jurisdiction shopping may be seen to achieve a geographic, political and/or legal distancing of the less palatable aspects of migration governance away from the sponsoring state. In the patchwork of national refugee and human rights jurisdictions, shifting the legal geography and/or government responsible for carrying out migration control may simultaneously reduce the acting state's protection responsibilities and shift legal obligations to third states whose 'human rights obligations are either lower, less extensive or less precise than those of the destination State'.[58] Sponsoring states have not shied away from cooperating with non-parties to the 1951 Refugee Convention, such as Libya and Indonesia. Indeed, Nauru's then non-party status may have been part of the reason for Australia choosing it as a place for offshore asylum processing in 2001.[59] Papua New Guinea is party to the Convention but maintains several reservations, affecting core rights, such as non-penalization and freedom of movement, as well as refugees' standard of treatment in regard to housing, employment and education.[60]

As in the above case, both domestic jurisprudence and developments in international human rights law have made inroads to counter this dynamic. For example, the Australian High Court struck down the

[57] Ronen Palan, 'Tax Havens and the Commercialization of State Sovereignty' (2002) 56 *International Organization* 151–76; Gammeltoft-Hansen and Vedsted-Hansen, *Human Rights and the Dark Side of Globalisation*.

[58] Gregor Noll, 'The Politics of Saving Lives: Interception, Search and Rescue and the Question of Human Rights at Sea', paper presented at the Future of Asylum Policy in the European Union, Turku, 10 October 2006.

[59] Nauru acceded to the 1951 Convention Relating to the Status of Refugees as well as the 1967 Protocol on 28 June 2011.

[60] Diana Glazebrook, 'Papua New Guinea's Refugee Track Record and Its Obligations under the 2013 Regional Resettlement Arrangement with Australia', SSGM Discussion Paper 2014/3, Australian National University.

government's scheme to relocate asylum seekers arriving irregularly by boat to Malaysia.[61] In doing so, the court lent support to the general interpretative principle under the 1951 Refugee Convention that a state may only transfer an asylum seeker to a third state if equivalent 'effective protection' is provided there.[62] More generally, international human rights law jurisprudence has developed to accept shared and differentiated responsibility in a range of situations relevant to international cooperation on migration control and asylum processing.[63]

Even so, the market dynamic may in itself be argued to produce 'negative externalities' for the migrant. As in the case of privatization, the introduction of a third-party profit motive into migration management is likely to lead to cost-cutting,[64] and third states may thus be unwilling or unable to make good on promises to ensure effective human rights protection. While this is often suppressed at the political level, it is a foreseeable consequence. The efficiency of a market economy is premised on a feedback loop from consumers to suppliers: if consumers do not like the product, they will not buy it. Yet, the marketization of migration control represents a third-party provider economy, where the end-users (migrants) are not the same as the customers (sponsoring states) footing the bill. Migrants themselves do not get a voice in this equation and oversight and accountability mechanisms as part of these schemes are equally lacking. The result is a 'rights economy' in which human rights and refugee protection is either sought realized at the lowest possible cost or disbanded altogether.[65]

8.6 Understanding the Politics of Law in Regard to Rescue at Sea

How can we account for the developments of the SAR and SOLAS regimes, and their impact on the encounter between irregular boat migrants and

[61] *Plaintiffs M70/2011 and M106 of 2011 v. Minister for Immigration and Citizenship* ('*the Malaysia-Swap Arrangement case*') [2011] HCA 32.

[62] Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia-Pacific Region' (2014) 27 *Journal of Refugee Studies* 596–618; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223–86, at 230–31; Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567–667, at 570.

[63] Gammeltoft-Hansen and Hathaway, 'Non-Refoulement', 272ff.

[64] Gammeltoft-Hansen and Sørensen, *The Migration Industry*.

[65] Thomas Gammeltoft-Hansen, 'Outsourcing Asylum: The Advent of Protection Lite', in Luiza Bialasiewicz (ed.), *Europe in the World: EU Geopolitics and the Making of European Space* (Farnham, UK: Ashgate, 2011), 129–52.

sovereign authorities on the high seas? At face value it might fit a governance framework, characterized by transnational dynamics, the evaporation of boundaries, a growing interdependence between a plurality of state and non-state actors, and the thickening of international regimes and regulation. Within such a framework the emphasis is on the linkages between formally equal members of the international society (networks of interdependence), whose dealings with each other regarding shared problems take place on an equal footing, without relying on centralized, hierarchical and coercive authority structures to create international order. In this view governance is conceived as rescuing the international community from 'sovereignty's worst instincts'.[66] Sovereignty is, in this case, conceived in terms of autonomy and freedom, and works – like traditional conceptions of power – as a zero-sum game.[67]

Yet, such an understanding misses out on the more intricate relationship between sovereignty, power and international law, between freedom, rule and responsibility, that seem to be at play in the encounter between sovereigns and boat migrants at the high seas. The amendments to the SAR and SOLAS conventions do not just connote a development from the international law of co-existence to the international law of cooperation[68] regarding rescue at sea that limits and/or 'tames' state freedom in the *Mare Liberum*. Rather, the cooperative regime in the international realm involves a transformation of the logic of politics and the functioning of power itself in relation to states as the simultaneous masters and subjects of international law.[69]

Crucially, this functioning of power is not separate from the legal realm but part and parcel of the manifestation of sovereign identity as it is embedded in international legal regime at play. In case of the SAR regime, it is the ongoing normative developments that provide the context within which the sovereignty game at the high seas is carried out. For example, the zonal divisions of the *Mare Liberum* through the search and rescue regime not only replicate the powerful imaginary of territorial jurisdiction, but equally can be conceived as a particular way of governing the high seas by linking freedom with responsibility.

[66] Michael Barnett and Raymond Duvall, *Power in Global Governance* (Cambridge: Cambridge University Press, 2005), 1.

[67] See further Chapter 2, this volume.

[68] Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964).

[69] Iver B. Neumann and Ole Jacob Sending, 'The International as Governmentality' (2007) 35 *Millennium* 677–701.

Together this leads to a different analytics of the politics of law in the context of the high seas. International law does not necessarily work through liberal internalization and socialization processes,[70] nor is it a redundant normative layer to the rationalist sovereignty game where the key players are conceived as atomistic subjects that pursue their self-interested strategies regardless of the international normative context in which they encounter each other.[71] Rather, as we argued in the above, it is precisely because of the normative patchwork established by the search and rescue regime, human rights and refugee law that sovereign states take pains to *dis*claim their sovereignty, rather than jealously guard it. It is precisely the increasing codification of the international realm, including the high seas, that at once creates the necessity of disclaiming practices *and* provides the tools to do so.

In the encounter between European authorities and migrants on the high seas, the sovereign in other words makes use of the discretion to interpret legal rules and/or apply different legal regimes and thus seek redefine and demarcate its sovereign responsibility under these diverse systems of rules and regimes.

8.7 Conclusion

The high seas remain one of the few places on earth not subject to a national sovereign legal order, which could be said to make the legal framework rather thin, both legally and, especially, institutionally. The lack of a domestic legal order makes shifts between different legal regimes easier and subject to less oversight and means for resolution. Enforcing and monitoring the application of maritime regimes thus becomes inherently difficult. The lack of legal clarity and protection of migrant lives have led some scholars to describe the situation in the Mediterranean with regard to search and rescue as the 'Wild West'.[72]

It would be misguided, however, to think of the high seas as a space of legal exception per se. The law of the sea, international human right law and EU law together provide a normative framework for governance, albeit with somewhat different arrangements of the relationship between

[70] See e.g. Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887–917.

[71] See e.g. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

[72] Derek Lutterbeck, 'Small Frontier Island: Malta and the Challenge of Irregular Migraiton' (2009) 20 *Mediterranean Quarterly* 119–41, at 131.

autonomy and responsibility for states engaged in migration control and search and rescue in the Mediterranean. In this chapter, we have tried to show how a geopolitics of the *Mare Liberum* is thereby created through which states may seek to disclaim responsibilities through different strategies, notably regime shopping, legal interpretation and jurisdiction shopping.

While from the perspective of governments these strategies are all coached and enacted in the language of international law, the result easily appears exactly opposite from the perspective of the boat migrant. Rather than creating a dense net that will provide for a better protection of migrants and refugees, the codification of the *Mare Liberum* has simultaneously created loopholes that enable states to barter off their sovereignty at the expense of their responsibility towards those in distress at sea. Consequently, the boat migrant far too often find herself no longer caught in it and consequently out of legality altogether.[73]

[73] Hannah Arendt, 'The Perplexities of the Rights of Man', in Peter Baehr (ed.), *The Portable Hannah Arendt* (New York: Penguin Books, 2000), 31–45, at 34ff.